IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1073 of 2006
With
CRIMINAL MISC.APPLICATION No. 855 of 2007
In CRIMINAL APPEAL No. 1073 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MASKUR ALAMKHAN BAHADURKHAN PATHAN - Appellant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :
MR MM TIRMIZI for Appellant
MR KT DAVE ADDL. PUBLIC PROSECUTOR for Respondent

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 05/02/2007

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in this appeal filed under Section 374 of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 28.4.2006 rendered in Sessions Case No. 5 of 2004 by the learned Additional Sessions Judge (Presiding Officer and Fast Track Court No.12), Vadodara. By the impugned judgment and order, the appellant ('the accused' for short) has been convicted for commission of the offence under Section 304 Part II of the Indian Penal Code ('IPC' for short) and sentenced to suffer imprisonment for ten years and fine of Rs.50,000/-, and in default of payment of fine, imprisonment for a further period of six months. The order also stipulates that from the amount of fine of Rs.50,000/-, Rs.25,000/- shall be paid to the father and mother of the victim boy, Mahendra Ratansinh Solanki.

2. The prosecution case, as disclosed from the

hospital vardhi and unfolded during trial, is as under:

2.1. P.W.3 R.B. Chavda, at the relevant time PSI of Chhani Police Station, was on duty at the police station on 30.3.2003. At about 20.00 hours on that day he received a Vardhi from SSG Hospital, Vadodara to the effect that a boy aged about eight years, who was passing by Swaminarayan Mandir, village Chhani, at about 20.00 hours was hit by a vehicle which was coming from the other side and as a result of the accident he sustained injuries and he was taken to Government Hospital, Chhani and on the basis of refer memo, he was taken to SSG Hospital by his father Ratansinh Solanki and he was declared dead. At that time P.W.3, R.B. Chavda, also received a telephone call at Chhani Police Station from an anonymous person informing him that at Chhani Tolnaka a bullet was fired from a gun of a security guard and it hit a boy.

2.2. On receipt of the aforesaid two vardhi/information, P.W.3, immediately rushed in his vehicle along with his Writer Constable Rameshbhai Dhanjibhai and reached at SSG Hospital and met Dr. G.A. Patel, a medical officer and asked him regarding the incident. The doctor informed him that a boy was brought by his father Ratansinh Solanki for treatment who died and his body was kept in the cold room. His father said that it does not seem to be a case of vehicular accidental death. Thereafter P.W.3 and Dr. G.A. Patel went to the cold room and in the presence of P.W.3, Dr. G.A. Patel examined the dead body and on clinical examination, on the left ear and on the chest part and thigh of the dead body, some black coloured small holes were found and after examining such injuries, P.W.3 and the doctor reached to the conclusion that the body was hit by some bullets fired from the gun. Thereafter P.W.3 tried to find out the father of the deceased boy near the causality department but he was not found there.

2.3. Immediately thereafter he and his writer police constable Rameshbhai went towards the Tolnaka and inquired about the security personnel on duty i.e., Shobha Ram Yadav and Gulabsingh Kevalsingh Gautam (Rajput) and they informed him that along with them Maskur Alamkhan Bahadurkhan Pathan was also on duty. He was sitting on the chair and was literally yawning and sleeping and he was having a 12 bore gun in his hand and all of a sudden an explosion took place and he immediately woke up from sleep and all were frightened and immediately they came to know that on the east side of the tol-naka on the service road, near one STD/PCO, a boy fell down and the said boy was taken by his relatives on scooter to Chhani Heath Centre. P.W.3 thereafter called Maskur Alamkhan Pathan, a resident of Chhani Jakatnaka, along with the gun to Chhani police station and he, in the presence of P.W.3, admitted that from his gun all of a sudden one bullet got fired. Said Maskur Pathan had also brought the license of the gun along with him.

2.4. As per further case of the prosecution, Maskur Alikhan Pathan, who was the owner of the 12 bore gun, thoroughly knowing how to operate the said gun and how to keep the weapon and having on an important work like performing his duty along with the gun and fully knowing that if a bullet is fired from the gun, the same can result in death of a person, slept while on duty on 30.3.2003 in night hours at about 8.30 P.M. and the trigger of the gun was pressed by his hand and a bullet was fired which hit the injured boy named Mahendra, aged about 8 years, near the STD/PCO situated on the service road, at the east side of the tol naka and he died and thus the accused has committed an offence under Section 304 IPC. A complaint in respect of the aforesaid incident was filed by P.W.3 at Chhani Police Station which was registered vide CR.No.I-56/2003 for commission of offence under section 304 IPC against the accused.

2.5. Pursuant to the filing of the complaint, investigation was handed over to P.W.16, Bhagirathsinh Jashvantsinh Jadeja. On taking over of the investigation by him, inquest was held on the dead body of Mahendra. Thereafter his dead body was sent for autopsy. He recorded the statements of the witnesses, including the security staff as well as staff members of the tol naka. He also drew the panchnama of the scene of offence. He recovered 12 bore gun from the accused by drawing a panchnama along with cartridges. He has also recovered the clothes put on by the deceased and sent them to FSL for analysis. In the course of investigation it was confirmed that it was not a vehicular accidental death case but it was a case of homicidal death as the accused is fully knowing well that he has got a licensed bore gun and yet he slept during duty hours and during that time the trigger of the gun was pressed as a result of which a bullet got fired and it hit the victim boy Mahendra who received serious injuries and succumbed to the

same. Therefore, it was a case of homicidal death. Thereafter he has handed over investigation to Vairagi, a police inspector of Chhani police station who filed charge sheet against the accused for commission of the offence under Section 304 IPC in the court of learned JMFC, Court No.4, Vadodara.

2.6. As the offence under Section 304 IPC is exclusively triable by a court of sessions, the learned JMFC, Court No.4, Vadodara committed the case to the Court of Sessions, Vadodara.

2.7. The learned Additional Sessions Judge, Vadodara, to whom the case was made over for trial, framed charge against the accused for commission of offence under Section 304 IPC and as the accused pleaded not guilty to the charge and claimed to be tried, he was put to trial in Sessions Case No.5 of 2004.

2.8. To prove the culpability of the accused,

the prosecution has examined as many as 16 witnesses and relied upon their oral testimonies, the details of which have been given in para 2 of the impugned judgment and order. They are as under:

P.W. No.	Particulars	Ex. No.
1.	Ishwarbhai Shamjibhai Patel, panch witness of scene of offence	9
2.	Rajkishore Shivpujan Mishra, Panch witness of inquest panchnama	11
3.	Ratansinh Becharsinh Chavda, complainant – PSI, Chhani Police Station	14
4.	Kanubhai Chaturbhai, Panch witness	17
5.	Kanubhai Devjibhai Parmar, security guard	21
6.	Hiteshbhai Kantilal Parmar, security guard	22
7.	Pinakin Mahendrabhai Patel, Supervisor at tol-naka	23
8.	Patel Ketanbhai Bhagwanbhai, Supervisor of tol naka	24
9.	Dr. Vaishakhiben Yashwantray Shukla, the doctor who performed post mortem	25
10.	Mayankkumar Maheshchandra, Officer of FSL	27
11.	Khumansing Ramsing Parmar, ASI, Chhani Police Station	30
12.	Somabhai Dhanjibhai Vasava, Police Constable, Chhani Police Station.	31
13.	Ratansinh Amarsinh Solanki, father of deceased boy	32

P.W. No.	Particulars	Ex. No.
14.	Meenaben Ratansinh Solanki, mother of the deceased	33
15.	Basirbhai Bajibhai Garasiya, PSO, Chhani Police Station	35
16.	Bhagirathsinh Jashwantsinh Jadeja, Investigating Officer.	28

2.9. The prosecution has also produced a number of documents and relied upon the contents of the same, details of which have been given in para 2 of the impugned judgment and order. They are as under:

Sr. No.	Description	Ex. No.
1.	Panchnama of the scene of offence	10
2.	Inquest panchnama	12
3.	Complaint	15
4.	Original vardhi from hospital	16
5.	Panchnama in respect of recovery of clothes, etc., of the deceased boy	18
6.	Panchnama in respect of recovery of gun, cartridge, etc.	19
7.	Panchnama of the licence produced by the accused	20
8.	Post-mortem notes	26
9.	Acknowledgment regarding receiving of muddamal at FSL	28

Sr. No.	Description	Ex. No.
10.	Letter from FSL	29
11.	True copy of station diary	36
12.	Order passed by PSO after recording the complaint	37
13.	Forwarding letter in respect of muddamal	39
14.	Receipt regarding receiving of muddamal at FSL	40
15.	Report of FSL	41
16.	Letter written for post mortem examination	42
17.	Police report sent with dead body	43

2.10. After recording of the prosecution witnesses was over, the trial court explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement as required under section 313 of the Code. In his further statement, he denied the prosecution case in toto. However, he did not lead any evidence nor did he examine any witness in support of his defence.

2.11. On appreciation, evaluation, analysis and

scrutiny of the evidence on record, the trial court came to the conclusion that the prosecution has established that the victim boy Mahendra died a homicidal death and the prosecution has also been able to establish the charge against the accused for commission of offence under Section 304 IPC on the basis of the circumstantial evidence. As the complicity of the accused for commission of the said offence is proved, the trial Court convicted him for commission of the offence under Section 304 Part II IPC and sentenced him to suffer imprisonment for ten years and fine of Rs.50,0000/- i.e., imprisonment for further six months, to which reference is made in earlier paragraph of this judgment, which has given rise to instant appeal at the instance of the accused.

3. Mr. M.M. Tirmizi, learned advocate for the accused, has assailed the impugned judgment and order of conviction and sentence mainly on three grounds:

(i) The prosecution case depended on the circumstantial evidence only and the prosecution has not been able to establish all the links of the chain of the circumstances so as to unerringly point out that the accused is guilty of the offence of culpable homicide not amounting to murder.

(ii)Considering the totality of the evidence and on the facts and circumstances emerging from the record of the case, it can never be inferred that there was intention on the part of the accused to kill any person by gun shot nor had he the knowledge and, therefore, at the most, the act of the accused would amount to an act of negligence or rashness as he had a loaded gun with him when he was on duty.

(iii) The investigation was dishonest. As per the prosecution case, some unknown person had telephonically informed the police that the accused has committed culpable homicide not amounting to murder.

3.1. On the aforesaid premises, it is contended by him that the impugned judgment and order convicting the accused for commission of the offence punishable under Section 304 Part-II IPC deserves to be quashed and set aside.

3.2. According to him, at the most, since the accused was keeping a loaded gun with him and acted in a rash and negligent manner which has resulted in firing a shot from the gun which has claimed the life of an innocent boy who was passing on the road, the accused can be convicted for commission of the offence punishable under section 304A IPC i.e., causing death of any person by doing any rash or negligent act not amounting to culpable homicide. He, therefore, urged that the appeal may be allowed in part and the impugned judgment and order of conviction and sentence may be quashed and set aside or the same may be modified by convicting the accused for commission of an offence punishable under Section 304A IPC.

3.3. So far as the sentence is concerned, according to him, for commission of an offence under Section 304A IPC, the accused shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. In instant case, the accused has already undergone imprisonment for approximately a year and, therefore, the period of imprisonment undergone by the accused may be treated as substantial sentence and the accused may be set at liberty.

3.4. In support of the above submissions, Mr. Tirmizi, learned advocate for the accused, has relied upon the following judgments:

(i) Kalaji alias Prahladji Keshaji v. State of Gujarat, 1992 (1) GLR, 747, and

(ii) Ramanbhai Somabhai Kharadi v. State of Gujarat, 2006 (1) G.L.H. 255.

4. Per contra, Mr. K.T. Dave, learned APP

for the respondent – State of Gujarat, has contended that it is true that the act on the part of the accused does not amount to culpable homicide not amounting to murder. But looking to the position of the accused, who was a security guard at the relevant time and was keeping a loaded gun with him, acted in a very negligent manner and while dozing during duty hours at night, he had not taken any care to lock the gun and since the gun was not locked, the trigger was pressed and a bullet was fired from the gun which hit the innocent boy who was passing on the road which resulted in serious injuries to him and resultant death and hence the accused has committed an offence punishable under section 304A IPC and accordingly for commission of offence under Section 304A IPC he should be awarded the maximum sentence of two years and impose fine of a substantial amount so that the said amount can be paid to the family members of the victim by way of compensation. He, therefore, urged to pass appropriate order in this appeal.

5. This court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. This Court has examined the entire evidence on record for itself independently of the trial court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial court has rightly recorded the order of conviction and sentence. This Court has also carefully gone through the judgments cited at the bar by the learned advocate for the accused.

6. On re-appreciation, re-evaluation, reanalysis and threadbare close scrutiny of the evidence, there is no dispute that on the fateful

day, during night hours, the accused was on duty as security guard, at tol-naka, with a 12 bore licensed gun. There is no dispute that the said gun was loaded and not locked by the accused. It is clear from the evidence on record that at the relevant time the accused was dozing and the trigger was pressed and from the gun which was loaded but not locked, a bullet got fired which hit the victim who was passing through the road which caused his death. Therefore, according to us, there is no evidence to show or suggest that the accused had an intention to kill the victim boy who was passing on the road at the relevant time. The circumstance that the accused was the owner and he was holding the licensed gun with him alone is not sufficient to reach to the conclusion that the accused has committed the offence of culpable homicide not amounting to murder. There must be something more to establish the connectivity of the accused with the offence of culpable homicide not amounting to murder. Therefore, the first link in the chain of the circumstantial evidence against the accused to

connect him with the offence under section 304 Part II IPC is missing.

7. It is true that the accused was in possession of a fire arm at the relevant time. But that fact itself is not enough to implicate the accused with the commission of offence of culpable homicide not amounting to murder.

8. So far as the intention on the part of the accused with regard to killing an innocent person by gun shot is concerned, there is no evidence to the effect that the accused had an intention or knowledge that by his said act a bullet would be fired from his 12 bore gun and it would hit the victim boy. Therefore, according to us, the act of the accused at the most can be an act of rashness or negligence in keeping the fire arm unlocked during duty hours at night hours when he was dozing.

9. So far as the investigation carried out by the investigating officer, P.W.16, BJ Jadeja,

Ex.38 is concerned, of course it raises suspicion as, according to us, he conducted absolutely a poor investigation. As per the prosecution case, some unknown person informed the police about the alleged incident and the PSI made inquiry with Shobharam Yadav and Gulabsingh Kevlasingh Rajput, who were security guards at the tol-naka who gave the name of the accused. However, the prosecution has not examined these two persons who are independent witnesses of the alleged mishap. These two persons were present at the time of the alleged incident and their statements were also recorded by the police. Therefore, in the absence of any evidence of important witnesses, the conclusion drawn by the trial court that the accused has committed the offence of culpable homicide not amounting to murder does not stand to scrutiny of this court and, therefore, cannot be sustained.

10. In view of the aforesaid evidence on record, according to us, deceased Mahendra died because of gun shot injuries received by him and

it was an accidental death. Therefore, it has to be held that the deceased died an unnatural death i.e., accidental death and not a homicidal death.

11. At the cost of repetition, be it stated that the accused who was a security guard at the relevant time, had a 12 bore loaded gun with him on the fateful day, at the night hours, while he was on duty, and as per the evidence on record, he was dozing and because of dozing, the trigger of the gun was pressed and as a gun was not locked and it was loaded, a bullet was fired from the gun which hit the innocent boy who was passing on the road which resulted in serious injuries to him and his death. Therefore, this act on the part of the accused of causing death of the deceased boy Mahendra by rash and negligent act, punishable under Section 304A IPC and hence he is found guilty of the said offence.

12. While dealing with a similar question, a learned Single Judge of this court in the case of Kalaji alias Prahladji Keshaji v. State of

Gujarat, (supra) has observed in paras 6 and 7 of the judgment, as under:

> "6. Now the question that arises is as to whether this is a case where the act can be said to have been done with the requisite intention or knowledge or whether it is a negligent act. The fact remains that the live wire was connected with the bicycle and on account of that the deceased got a shock when he touched it. Normally everyone would have knowledge that when a live wire is touched, one would get shock, but whether from that only act, can it be inferred that it is with the intention or knowledge on the part of the present accused to cause injury which is likely to cause death. He ought to have placed a sign board, a caution or warning for not touching the bicycle or coming nearby it and since it has not been done in the present case, it amounts to negligence on his part. If he has not so done and somebody touches, it would be on account of his negligence and

not on account of his knowledge.

7. Here in the present case, considering the facts and circumstances of the case, it can never be inferred as there is no evidence to suggest that it was the intention on the part of the present appellant to kill any person by giving electric shock, nor he had any knowledge as such that Natubhai would touch it and he would succumb to electric shock and therefore, at the most his act would amount to an act of negligence in not placing the sign board or warning and therefore the case would be clearly covered under Sec.304A of the Indian Penal Code. In that view of the matter, the conviction and sentence awarded to accused No.1, the appellant, for the offence punishable under Sec.304 Part II cannot be sustained."

14. A similar question arose before another Single Judge of this Court in the case of Ramanbhai Somabhai Kharadi v. State of Gujarat,

(supra). In the said case, the appellant/accused was deputed to maintain bandobast. All of a sudden he lit a match stick and carelessly threw the same on the ground in complete disregard of the safety of the persons gathered there including his own self, where a tanker containing a highly inflammable chemical called 'neptha' had turned turtle, which got fire and resulted into fatal causalities. In the said fact situation, it was observed that in absence of any evidence that the accused had knowledge of the same, conviction under section 304 Part II read with Sections 324 and 435 IPC will not sustain and the conviction was altered to offence punishable under Section 304A IPC.

15. Applying the principles laid down by this Court in the above referred to two judgments to the facts of the present case, it can never be inferred, as there is no evidence, that there was any intention on the part of the accused to kill any person, and it is clear that it was only a sheer negligent act on the part of the accused

that, he pressed the trigger of the loaded gun which was not locked, while dozing on duty hours at night and as a result of his negligence, a bullet got fired from the gun which hit the unfortunate victim who was passing on the road and claimed his life. Therefore, according to us, at the most, this act on the part of the accused amounts to an act of negligence and not an offence of culpable homicide not amounting to murder.

16. Besides this, it has also come in evidence that independent witnesses like i.e., P.W.5, Kanubhai Devjibhai Parmar, Ex.21, P.W.6, Hiteshbhai Kantilal Parmar, Ex.22, P.W.7, Pinakin Mahendrabhi Patel, Ex.23 and P.W.8, Ketanbhai Bhagwanbhai Patel, Ex.24 who were serving at the tol-naka where the alleged incident had taken place have not supported the prosecution case and, therefore, they were declared hostile. In sum and substance, there is no corroboration to the prosecution case from any independent witness.

17. Seen in the above context, according to us, the impugned judgment and order convicting the accused for commission of the offence punishable under Section 304 Part II IPC deserves to be quashed and set aside by altering the conviction to one under Section 304A IPC.

18. Having held that the accused is guilty of the offence punishable under Section 304A IPC, now the question that arises for consideration of this Court is as to what sentence should be imposed on the accused for commission of the said offence.

19. So far as the punishment prescribed for commission of the offence under Section 304A IPC is concerned, it is punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both. In instant case, on the facts and circumstances emerging from the record of the case, we are of the considered opinion that if the sentence of

R.I. for one year and fine of Rs.25,000/- and in default of payment of fine, R.I. for further period of six months is imposed on the accused, the same would meet the ends of justice.

20. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed. The impugned judgment and order dated 28.4.2006 passed by the trial court in Sessions Case No.5 of 2004 convicting the accused for commission of offence under Section 304 Part II IPC is hereby quashed and set aside and instead of that the accused is convicted for commission of the offence punishable under Section 304A IPC. For commission of the offence under Section 304A IPC, the accused is sentenced to suffer R.I. for one year and fine of Rs.25,000/- and in default of payment of fine, the accused shall undergo R.I. for a further period of six months.

20.1. If the amount of fine of Rs.25,000/- is paid by the accused, out of the said amount of fine, Rs.12,500/- shall be paid to the father and

Rs.12,500/- shall be paid to the mother of the victim boy Mahendra, by the concerned Sessions Court, upon due verification.

20.2. It is needless to mention and also clarified that if the amount of fine of Rs.25,000/- is paid by the accused and received by the parents of the victim, this order shall not preclude the parents of the victim boy Mahendra from filing suit to recover compensation from the accused or from his employer, under the law of torts, for the untimely demise of their son on account of the negligent act on the part of the accused.

20.3. With the above observations and directions, this appeal stands partly allowed.

21. In view of the above order passed in Criminal Appeal No.1073 of 2006 partly allowing it, Mr. Tirmizi, learned advocate for the accused, does not press Criminal Misc. Application No.855 of 2007 which is filed for suspending the sentence

imposed on the accused and also for releasing the accused on bail. Hence, Criminal Misc. application No.855 of 2007 stands disposed of having not pressed. Notice is discharged.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

(karan) ...